CHAPTER 1

PROCUREMENT FRAUD

I. INTRODUCTION. 1

II. TYPES OF FRAUD. 1

A. Defective Product/Product Substitution 1

B. Defective Testing 1

C. Bid-Rigging 1

D. Bribery and Public Corruption. 2

E. Defective Pricing 2

F. False Invoices 2

III. GOVERNMENT POLICY FOR COMBATTING FRAUD. 2

A. Department of Justice (DOJ) Policy. 2

B. Department of Defense (DOD) Policy. 2

IV. PLAYERS INVOLVED IN FRAUD ABATEMENT 3

A. DOD Inspector General. 3

B. Military Criminal Investigative Organizations. 3

C. Department of Justice. 4

D. Procurement Fraud Division (PFD) 4

E. Procurement Fraud Advisors 4

V. CONTRACTING OFFICER AUTHORITY. 4

A. Actions Clearly Exceeding KO Authority. 4

B. Actions Clearly Within KO Authority. 4

VI. REPORTING REQUIREMENTS 5

A. Indicators of Fraud 5

B. Upon Receiving Indicators of Procurement Fraud 6

VII. CRIMINAL STATUTES 7

A. Conspiracy to Defraud 7

B. False Claims. 7

C. False Statements. 8

D. Mail Fraud and Wire Fraud. 9

E. Major Fraud Act 9

F. Title 10 (U.C.M.J.) 10

VIII. CIVIL REMEDIES 10

A. The Civil False Claims Act.. 10

B. Liability Under the False Claims Act 10

C. Damages 11

D. Civil Penalties 12

IX. THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT. 12

X. ADMINISTRATIVE REMEDIES. 15

A. Basics. 15

B. Debarment. 15

C. Suspension. 17

D. Effect of Debarment or Suspension. 18

E. Period of Debarment. 19

F. Period of Suspension. 19

XI. CONTRACTUAL REMEDIES.....20
A. Historical Right.....20
B. Denial of Claims. 21
C. Countercalims Under the CDA. 21
D. Default Terminations Based on Fraud. 21
E. Voiding Contracts Pursuant to FAR 3.7 23
F. Suspending Payments Upon a Finding of Fraud, FAR 32.006 23
G. Voiding Contracts Pursuant to the Gratuities Clause, FAR 52.203-3 24
XII. BOARD'S OF CONTRACT APPEAL TREATMENT OF FRAUD.....25
A. Jurisdiction.....25
B. Dismissals, Suspensions and Stays. 25
C. Fraud as an Affirmative Defense 26
XIII. CONCLUSION. 26

CHAPTER 1

PROCUREMENT FRAUD

I. INTRODUCTION.

> "The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. . . . The financial element in the transaction is not the sole or principle thing involved. This suit was brought to vindicate the policy of the Government. . . . The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States." Pan Am. Petroleum and Transp. v. United States, 273 U.S. 456, 509 (1927).

II. TYPES OF FRAUD.

A. Defective Product/Product Substitution: These terms generally refer to cases where contractors deliver to the Government goods which do not conform to contract requirements without informing the Government. United States v. Hoffman, 62 F. 3d 1418 (6th Cir. 1995).

B. Defective Testing: This subset of defective products cases results from the failure of a contractor to perform contractually required tests, or its failure to perform such testing in the required manner.

C. Bid-Rigging: The absence of competition deprives the government of its most reliable measure of what the price should have been. Measure of damages is "the difference between what the government actually paid on the fraudulent claim and what it would have paid had there been fair, open and competitive bidding." United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988); see also Brown v. United States, 524 F.2d 693, 706 (1975); United States v. Porat, 17 F.3d 660 (3rd Cir. 1993).

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D. Bribery and Public Corruption: The breach of an employee's duty of loyalty. See, e.g., United States v. Carter, 217 U.S. 286 (1910); United States v. Brewster, 408 U.S. 501 (1972).

E. Defective Pricing: The Truth in Negotiations Act ("TINA"), 10 U.S.C. § 2306a, together with its implementing regulations, 48 C.F.R. § 15.8 et seq. ("Price Negotiation"), requires contractors in certain negotiated procurements to disclose and certify that disclosed details concerning expected costs ("cost or pricing data") are accurate, current and complete. A perceived or actual violation of TINA may serve as the predicate for a fraud investigation and civil or criminal prosecution by the Government. United States v. Broderson, 67 F. 3d 452 (2d Cir. 1995).

F. False Invoices. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 545 (10th Cir. 2000) (Monthly invoices submitted when the contractor was knowingly not complying with contract terms can be the basis of False Claims Act liability. A claimant can premise a claim on a "false implied certification of contractual compliance.")

III. GOVERNMENT POLICY FOR COMBATTING PROCUREMENT FRAUD.

A. Department of Justice (DOJ) Policy. DOJ policy requires the coordination of parallel criminal, civil, and administrative proceedings so as to maximize the government's ability to obtain favorable results in cases involving procurement fraud. See U.S. Dep't of Justice, U.S. Att'ys Man. ch. 1-12.000 (Coordination of Parallel Criminal, Civil, and Administrative Proceedings) June 1998.

B. Department of Defense (DOD) Policy. DOD policy requires the coordinated use of criminal, civil, administrative, and contractual remedies in suspected cases involving procurement fraud. See U.S. DEPT OF DEFENSE, DIR. 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (7 June 1989); U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION, 19 Sept. 1994; U.S. DEP'T OF AIR FORCE, DIR. 51-11, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO AIR FORCE PROCUREMENT MATTERS, 21 Oct. 1994; U.S. DEP'T OF NAVY, INST. 5430.92A, OP-008, ASSIGNMENT OF RESPONSIBILITIES TO COUNTERACT FRAUD, WASTE, AND RELATED IMPROPRIETIES WITHIN THE DEPARTMENT OF THE NAVY, (20 Aug. 1987).

1. DOD policy requires each department to establish a centralized organization to monitor all significant fraud and corruption cases.

2. Definition of a "significant" case.

    a. All fraud cases involving an alleged loss of $100,000 or more.

    b. All corruption cases that involve bribery, gratuities, or conflicts of interest.

    c. All investigations into defective products or product substitution in which a serious hazard to health, safety, or operational readiness is indicated (regardless of loss value).

3. Each centralized organization monitors all significant cases to ensure that all proper and effective criminal, civil, administrative, and contractual remedies are considered and pursued in a timely manner.

4. Product Substitution/Defective Product cases receive special attention.

5. DOD Voluntary Disclosure Program. DOD IG Pamphlet IGDPH 5505.50, Voluntary Disclosure Program—A Description of the Process (April. 1990).

IV. PLAYERS INVOLVED IN FRAUD ABATEMENT.

A. DOD Inspector General. Inspector General Act of 1978, Pub. L. 95-452, as amended by Pub. L. No. 97-252; DOD Dir. 5106.1, Inspector General of Department of Defense (Mar. 14, 1983).

B. Military Criminal Investigative Organizations.

C. Department of Justice. DOD Dir. 5525.7, Memorandum of Understanding Between Department of Defense and Department of Justice Relating to the Investigation and Prosecution of Certain Crimes (Jan. 22, 1985).

D. Procurement Fraud Division (PFD), USALSA. AR 27-40, Litigation, Ch. 8.

E. Procurement Fraud Advisors (PFA) (subordinate commands) - ensure that commanders and contracting officers pursue, in a timely manner, all applicable criminal, civil, contractual, and administrative remedies.

V. CONTRACTING OFFICER AUTHORITY.

A. Actions Clearly Exceeding KO Authority. The Contract Disputes Act, 41 U.S.C. § 605(a), as implemented by FAR 33.210, prohibits any contracting officer or agency head from settling, paying, compromising or otherwise adjusting any claim involving fraud.

B. Actions Clearly Within KO Authority.

1. Refusing Payment. It is the plain duty of administrative, accounting, and auditing officials of the government to refuse approval and to prevent payment of public monies under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken. To the Secretary of the Army, B-154766, 44 Comp. Gen. 111 (1964).

2. Suspend Progress Payments. 10 U.S.C. § 2307(e)(2); Brown v. United States, 207 Ct. Cl. 768, 524 F.2d 693 (1975); Fidelity Construction, DOT CAB No. 1113, 80-2 BCA ¶ 14,819.

3. Withhold Payment.

a. When a debarment/suspension report recommends debarment or suspension based on fraud or criminal conduct involving a current contract, all funds becoming due on that contract shall be withheld unless directed otherwise by the Head of the Contracting Activity (HCA) or the Commander, U.S. Army Legal Services Agency. AFARS 9.406-3.

b. Labor standards statutes provide for withholding for labor standards violations. WHA – 41 U.S.C. § 36; DBA – 40 U.S.C. § 276a-2; SCA – 41 U.S.C. § 353(a).

c. Specific contract provisions may provide for withholding (e.g., service contract deductions for deficiencies in performance).

d. Terminate Negotiations. FAR 49.106 (terminate settlement discussions regarding a terminated contract upon suspicion of fraud); K&R Eng'g Co., Inc., v. United States, 222 Ct. Cl. 340, 616 F.2d 469 (1980).

e. Determine Contractor to be Nonresponsible. FAR Subpart 9.4.

VI. REPORTING REQUIREMENTS.

A. Indicators of Fraud. Indicators of Fraud in DOD Procurement, IG, DOD 4075.1-H (June 1987). Common examples include:

1. Anticompetitive Activities. 15 U.S.C. § 1.

2. False Statements. 18 U.S.C. § 1001.

3. False Claims. 18 U.S.C. § 287.

B. Upon receiving or uncovering substantial indications of procurement fraud:

1. PFA should report the matter promptly to their supporting Army Criminal Investigation Command (USACIDC) element.

2. In such cases, the PFA must also submit a "Procurement Flash Report" to PFD. The flash report should contain the following information:

a. Name and address of contractor;

b. Known subsidiaries of parent firms;

c. Contracts involved in potential fraud;

d. Nature of the potential fraud;

e. Summary of the pertinent facts; and

f. Possible damages.

3. DFARS 209.406-3 Report. The contracting officer is also required to submit an investigative-referral report.

4. Remedies Plan. In significant cases, the PFA must prepare a comprehensive remedies plan. The remedies plan should include the following:

a. Summary of allegations;

b. Statement of adverse impact on DOD mission;

c. Statement of impact upon combat readiness and safety of DA personnel; and

d. Consideration of each criminal, civil, contractual, and administrative remedy available.

5. Litigation Report. If the PFA determines that a civil proceeding, such as under the Civil False Claims Act, may be appropriate, the PFA should consult PFD to determine if a litigation report is necessary.

VII. CRIMINAL STATUTES.

A. Conspiracy to Defraud, 18 U.S.C. § 286 (with claims) and 18 U.S.C. § 371 (in general). The general elements of a conspiracy under either statute include:

1. Knowing agreement by two or more persons which has as its object the commission of a criminal offense, or to defraud the United States; United States v. Upton, 91 F.3rd 677 (5th Cir. 1996);

2. Intentional and actual participation in the conspiracy; and

3. Performance by one or more of the conspirators of an overt act in furtherance of the unlawful goal. United States v. Falcone, 311 U.S. 205, 210-211 (1940); United States v. Richmond, 700 U.S. 1183, 1190 (8th Cir. 1983).

B. False Claims, 18 U.S.C. § 287.

1. The elements required for a conviction under Section 287 include:

a. Proof of a claim for money or property, which is false, fictitious, or fraudulent and material.

b. Made or presented against a department or agency of the United States; and

c. Submitted with a specific intent to violate the law or with a consciousness of wrongdoing, i.e., the person must know at the time that the claim is false, fictitious, or fraudulent. See generally United States v. Slocum, 708 F.2d 587, 596 (11th Cir. 1983) (citing United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1134 (E.D. Va. 1981), rev'd on other grounds, 689 F.2d 1181 (4th Cir. 1981)) (false indemnity claims made to USDA).

2. It is of no significance to a prosecution under section 287 that the claim was not paid. United States v. Coachman, 727 F.2d 1293, 1302 (D.C. Cir.), cert. denied, 419 U.S. 1047 (1984).

C. False Statements, 18 U.S.C. § 1001.

1. The elements include proof that:

a. The defendant made a statement or submitted a false entry. "Statement" has been interpreted to include oral and unsworn statements. United States v. Massey, 550 F.2d 300 (5th Cir.), on remand, 437 F. Supp. 843 (M.D. Fla. 1977).

b. The statement was false.

c. The statement concerned a matter within the jurisdiction of a federal department or agency.

d. The government also must prove that a statement was "material." The test of materiality is whether the natural and probable tendency of the statement would be to affect or influence governmental action. United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980); United States v. Randazzo, 80 F. 3d 623, 630 (1st Cir. 1996); United States ex. Rel. Berge v. Board of Trustees University of Alabama, 104 F.3d 1453 (4th Cir. 1997).

e. Intent.

(1) The required intent has been defined as "the intent to deprive someone of something by means of deceit." United States v. Lichenstein, 610 F.2d 1272, 1277 (5th Cir. 1980).

(2) A false statement must be knowingly made and willfully submitted. United States v. Guzman, 781 F.2d 428, (5th Cir. 1986).

D. Mail Fraud and Wire Fraud: 18 U.S.C. §§ 1341-43.

1. The essence of the mail fraud and wire fraud statutes is the use of mails or wire communications to execute a scheme to defraud the United States. Both statutes are broadly worded to prohibit the use of the mails or interstate telecommunications systems to further such schemes.

2. The elements of the two offenses are similar. Because the elements are similar, the cases interpreting the more recent wire fraud statute rely on the precedents interpreting mail fraud. See, e.g., United States v. Cusino, 694 F.2d 185 (9th Cir. 1982), cert. denied, 461 U.S. 932 (1983); United States v. Merlinger, 16 F. 3rd 670 (6th Cir. 1994). They include:

a. Formation of a scheme and artifice to defraud.

b. Use of either the mails or interstate wire transmissions in furtherance of the scheme. See United States v. Pintar, 630 F.2d 1270, 1280 (8th Cir. 1980) (mail fraud); United States v. Wise, 553 F.2d 1173 (8th Cir. 1977) (wire fraud).

E. Major Fraud Act. 18 U.S.C. § 1031.

1. The Act created a new criminal offense of "major fraud" against the United States. It is designed to deter major defense contractors from committing procurement fraud by imposing stiffer penalties and significantly higher fines.

2. Maximum Punishments: ten years confinement; fines are determined on a sliding scale based on certain aggravating factors. Basic Offense: $1,000,000 per count. Government loss or contractor gain of $500,000 or more: $5,000,000. Conscious or reckless risk of serious personal injury: $5,000,000. Multiple counts: $10,000,000 per prosecution.

3. Elements:

a. Knowingly engaging in any scheme with intent to defraud the U.S. or to obtain money by false or fraudulent pretenses;

b. On a U.S. contract; and

c. Valued at $1,000,000 or more. United States v. Brooks, 111 F.3d 365 (4th Cir. 1997). But see United States v. Nadi, 996 F.2d 548 (2nd Cir. 1993); United States v. Sain, 141 F.3d 463 (Fed. Cir. 1998).

F. Title 10 (UCMJ) Violations.

VIII. CIVIL REMEDIES.

A. The Civil False Claims Act. 31 U.S.C. §§ 3729-33 (1988).

1. Background.

2. 1986 Amendments.

3. The primary litigation weapon for combating fraud is the Civil False Claims Act.

B. Liability Under the False Claims Act.

1. In General. 31 U.S.C. § 3729(a), imposes liability on any person (defined comprehensively in 18 U.S.C. § 1 (1988) to include "corporations, companies, associations, partnerships . . . as well as individuals") who:

a. Knowingly presents, or causes to be presented, to an officer or employee of the United States government or a member of the Armed Forces of the United States, a false or fraudulent claim for payment or approval. United States v. Krizek, 111 F.3d 934 (D.C. 1997).

b. Conspires to defraud the government by having a false or fraudulent claim allowed or paid.

c. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States.

2. Source of funds used to pay. Funds with which a claim would be paid need not be "the United States's own money in the public fisc which requires Congressional appropriation to be withdrawn from the Treasury. Rather, it is enough if the money belongs to the United States. United States ex rel. DRC, Inc. v. Custer Battles , LLC, et. al., E.D. Va. No1:04cv199 (8 July 2005) (dismissing motion to dismiss qui tam suit and holding that False Claims Act applies to work in Iraq paid by the Coalition Provisional Authority but not to funds from the Development Fund for Iraq).

C. Damages.

1. Treble Damages are the substantive measure of liability. 31 U.S.C. § 3729(a); United States v. Peters, 110 F.3d 66 (8th Cir. 1997). Voluntary disclosures of the violation prior to the investigation, preclude the imposition of treble damages.

2. Different Scenarios.

a. Defective Products.

b. Defective Testing.

c. Bid-Rigging.

d. Bribery and Public Corruption.

D. Civil Penalties.

1. A civil penalty of between $5,500 and $11,000 per false claim. 31 U.S.C. § 3729. The amounts stated in the False Claims Act, 31 U.S.C. section 3729, are $5,000 and $10,000; however, under the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, §31001, 110 Stat. 1321-373 (1996), federal agencies are required to review and adjust statutory civil penalties for inflation every four years. Consequently, the Department of Justice has adjusted penalties under the False Claims Act to range not less than $5,500 and not more than $11,000 per violation. 28 C.F.R. § 85.3(a)(9)(2000).

2 Imposition is "automatic and mandatory for each false claim." S. Rep No. 345 at 8-10. See also United States v. Hughes, 585 F.2d 284, 286 (7th Cir. 1978) ("[t]his forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount.")

1. There is no requirement for the United States to prove that it suffered any damages. Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965). The government also does not have to show that it made any payments pursuant to false claims. United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).

2. United States v. Halper, 490 U.S. 435 (1989): Defendant faced aggregated penalties of $130,000 for fraud, which had damaged the government in the amount of $585. A civil sanction, in application, may be so divorced from any remedial goal as to constitute punishment under some circumstances. The scope of the holding is a narrow one, addressed to "the rare case . . . where a fixed-penalty provision subjects a small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." See United States v. Hatfield, 108 F.3d 67 (4th Cir. 1997).

IX. THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT.

Background.

1. "Qui tam pro domino rege quam pro se ipso in hac parte sequitur." ("Who as well for the King as for himself sues in this matter.")

2. Overview of the Process.

   a. The Civil False Claims Act authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States. 31 U.S.C. § 3730. The statute gives the Government 60 days to decide whether to join the action. If the Government joins the action, the Government conducts the action. If the Government decides not to join the suit, the individual (known as the "qui tam relator" conducts the action.

   b. As an inducement to be a whistleblower, the statute provides that relators are entitled to portions of any judgment against the defendant. 31 U.S.C. § 3730(d).

   c. If the government joins and conducts the suit, the relator is entitled to between 15 and 25 percent of judgment, depending on the relator's contribution to the success of the suit.

   d. If the Government declines to join and the relator conducts the suit, the relator is entitled to between 25 and 30 percent of the judgment, at the discretion of the court.

   e. Limitations on Relators. 31 U.S.C. § 3730(e)(4) significantly limits a person's ability to become a qui tam relator by providing that no court will have jurisdiction over an action "based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accountability Office report, hearing, audit or investigation, or from the news media" unless the person bringing the action is an "original source" of the information. The statute defines "original source" as an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action based on the information.

3. Qui Tam Litigation is a Growth Industry.

4. Qui Tam Developments.

a. Hughes Aircraft Company v. United States *ex rel*. Schumer, 520 U.S. 939 (1997). The first United States Supreme Court case to address the qui tam provisions since the 1986 Amendments.

b. Bly-Magee v. California, 236 F.3d 1014 (9th Cir. 2001). FCA claim viable without proof of government injury; state employees liable for acts beyond official duties.

c. Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5th Cir. 1997). Federal Circuits split on government's unlimited right to veto qui tam settlements. See Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994); United States *ex rel* Doyle v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000).

d. United States, *ex rel*. Dhawan v. New York City Health & Hosp. Corp., 2000 U.S.Dist. LEXIS 15,677 (S.D.N.Y. Oct. 27, 2000). Prior state court litigation resulted in public disclosure of FCA allegations.

e. United States, *ex rel.* Summit v. Michael Baker Corp., 40 F. Supp. 2d 772 (E.D. Va. 1999) (the court held that a qui tam relator may settle his retaliation claim under the FCA).

f. United States, *ex rel.* Stevens v. Vermont Agency of Natural Resources, 120 S.Ct. 1858 (2000) (A private individual may not bring suit in federal court on behalf of the United States against a state or state agency under the False Claims Act). See also Galvan v. Federal Prison Indus., Inc., 199 F.3d 461 (D.C. Cir. 1999) (Sovereign immunity bars qui tam suit against government corporation).

g. Cook County v. United States *ex rel.* Chandler, 123 S. Ct. 1239 2003 (2003) (a municipality is a "person" subject to suit under the FCA).

h. United States, *ex rel*. Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5th Cir. 1999), *rev'd and remanded en banc*, 252 F.3d 749 (5th Cir. 2001) (qui tam does not violates the "Take Care" and separation of powers provisions of the Constitution).

i. United States, *ex rel* Thorton v. Science Applications Int'l Corp., 207 F.3d 769 (5th Cir. 2000) (the value of administrative claims released by a contractor pursuant to a FCA settlement with the government are part of the settlement "proceeds" that the government must share with the relator).

j. United States *ex rel* Holmes v. Consumer Insurance Group, 318 F.3d 1199 (10 Cir. 2003) (en blanc) (federal employee could be a qui tam plaintiff).

X. ADMINISTRATIVE REMEDIES.

A. Debarment and Suspension Basics. 10 U.S.C. § 2393; FAR Subpart 9.4.

1. Suspension. Action taken by a suspending official to disqualify a contractor temporarily from Government contracting.

2. Debarment. Action taken by a debarring official to exclude a contractor from Government contracting for a specified period.

3. Government policy is to solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only.

4. Debarment and suspension are discretionary administrative actions to effectuate this policy and shall not be used for punishment. FAR 9.103(a); FAR 9.402; United States v. Glymp, 96 F.3d 722, 724 (4th Cir. 1996).

5. Debarring and suspending officials. DFARS 209.403. Any person may refer a matter to the agency debarring official. However, the absence of a referral will not preclude the debarring official from initiating the debarment or suspension process or from making a final decision. 64 Fed. Reg. 62984 (Nov. 18, 1999).

6. Debarments can be narrowly tailored to individuals, portions of a company, or to specific products that were the subject of the misconduct. FAR 9.406-1(b).

B. Debarment. Causes for debarment. FAR 9.406-2. DFARS 209.406-2.

1. Debarring official may debar a contractor for a **CONVICTION** of or **CIVIL JUDGMENT** for:

a. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.

b. Violation of federal or state antitrust statutes relating to the submission of offers.

c. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

d. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.

e. Criminal conviction for affixing “Made in America” labels to non-American goods.

f. Unfair trade practices.

2. Debarring official may debar a contractor, based upon a **PREPONDERANCE OF THE EVIDENCE** for:

a. Violation of the terms of a government contract or subcontract so serious as to justify debarment, such as

(1) Willful failure to perform in accordance with the terms of one or more contracts.

(2) A history of failure to perform, or unsatisfactory performance of, one or more contracts.

(3) Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

(4) Any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor.

b. "Preponderance" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. FAR 9.403. See Imco, Inc. v. United States, 33 Fed. Cl. 312 (1995).

C. Suspension. Causes for suspension. FAR 9.407-2.

1. Upon **ADEQUATE EVIDENCE** of:

a. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.

(1) Violation of federal or state antitrust statutes relating to the submission of offers.

(2) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

(3) Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

(4) Intentionally affixing a "Made in America" label to non-American goods.

(5) Unfair trade practices.

(6) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.

b. "Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR 9.403.

c. Indictment for any of the causes in paragraph a above constitutes "adequate evidence" for suspension. FAR 9.407-2.

d. "Adequate evidence" may include allegations in a civil complaint filed by another federal agency. See SDA, Inc., B-253355, Aug. 24, 1993, 93-2 CPD ¶ 132.

e. Upon adequate evidence, contractor may also be suspended for any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor. FAR 9.407-2.

D. Effect of Debarment or Suspension. FAR 9.405; DFARS 209.405.

1. As a result of § 2455 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994), **FAR 9.401** provides for government-wide effect of the debarment, proposed debarment, suspension, or any other exclusion of an entity from procurement OR nonprocurement activities.

2. Contractors proposed for debarment, suspended, or debarred may not receive government contracts, and agencies may not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless acquiring agency's head or designee determines that there is a compelling reason for such action.FAR 9.405(a).

3. The general rule is that absent a contrary determination by the ordering activity, debarment has no effect on the *continued performance* of contracts or subcontracts in existence at the time of the proposed or actual suspension or debarment. FAR 9.405-1. However, under DFARS 209.405-1, unless an agency head makes a compelling needs determination, DoD entities may not place orders exceeding guaranteed minimums under indefinite delivery contracts, nor may they place orders against Federal Supply Schedule contracts.

4. Bids received from any listed contractor are opened, entered on abstract of bids, and rejected unless there is a compelling reason for an exception.

5. Proposals, quotations, or offers from listed contractors shall not be evaluated, included in the competitive range, or discussions held unless there is a compelling reason for an exception.

E. Period of Debarment. FAR 9.406-4; DFARS 209.406-4.

1. Commensurate with the seriousness of the cause(s). Generally, debarment should not exceed three years except that debarment for violations of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 1481, may be for five years. FAR 23.506.

2. Administrative record must include relevant findings as to the appropriateness of the length of the debarment. Coccia v. Defense Logistics Agency, C.A. No. 89-6544, 1990 U.S. Dist. LEXIS 6079, (E.D. Pa. May 15, 1990). (Upholding 15-year debarment of former government employee convicted of taking bribes and kickbacks from contractors in exchange for contracts.)

3. The period of the proposed debarment, or any prior suspension, is considered in determining period of debarment.

4. Debarment period may be extended, but not solely on the original basis. If extension is necessary, normal procedures apply.

5. Period may be reduced (new evidence, reversal of conviction or judgment, elimination of causes, bona fide change in management).

6. Inconsistent treatment of corporate officials justifies overturning debarment decision. Kisser v. Kemp, 786 F. Supp. 38 (D.D.C. 1992).

F. Period of Suspension. FAR 9.407-4.

1. Suspension is temporary, pending completion of investigation or any ensuing legal proceedings.

2. If legal proceedings are not initiated within 12 months after the date of the suspension notice, terminate the suspension unless an Assistant Attorney General requests extension.

3. Extension upon request by an Assistant Attorney General shall not exceed 6 months.

4. Suspension may not exceed 18 months unless legal proceedings are initiated within that period.

XI. CONTRACTUAL REMEDIES.

A. Historical Right.

1. Under common law, where a party to a contract committed an act of fraud affecting a material element of the contract, the fraudulent act constituted a breach on the part of the party committing the act. The innocent party could then, at its election, insist on continuation of contract performance, or void the contract. Once voided, the voiding party would be liable under equity to the other party for any benefit received. Stoffela v. Nugent, 217 U.S. 499 (1910); Diamond Coal Co. v. Payne, 271 F. 362, 366 (App. D.C. 1921) ("equity refuses to give to the innocent party more than he is entitled to").

2. Since the U. S. government was often viewed as acting in a "commercial capacity" when it engaged in commercial transactions, the rules of common law and equity applied to resolution of disputes. As such, if the government sought to rescind a contract, it was obligated to restore the contractor to the position it would be in, but-for the breach. Cooke v. United States, 91 U.S. 389, 398 (1875) ("If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there."); Hollerbach v. United States, 233 U.S. 165 (1914); United States v. Fuller Co., 296 F. 178 (1923).

3. The Supreme Court rejected the general rule that the government should be treated like any other party to a contract when fraud. Pan American Petroleum and Transport Co., v. United States, 273 U.S. 456 (1927).

4. Courts and boards have developed an implied or common-law right to terminate or cancel a contract in order to effectuate the public policy of protecting the government in instances of procurement fraud. See United States v. Mississippi Valley Generating Co., 364 U.S. 520, reh'g denied 365 U.S. 855 (1961); Four-Phase Sys., Inc., ASBCA No. 26794, 86-2 BCA ¶ 18,924.

5. A contractor that engages in fraud in dealing with the government commits a material breach, which justifies terminating the entire contract for default. Joseph Morton Co., Inc. v. United States, 3 Cl. Ct. 120 (1983), aff'd 757 F.2d 1273 (Fed. Cir. 1985).

B. Denial of Claims.

1. Section 605(a) of the CDA prohibits an agency head from settling, compromising or otherwise adjusting any claim involving fraud. 41 U.S.C.S § 605(a). This limitation is reflected in FAR 33.210, which states that the authority of a contracting officer to decide or resolve a claim does not extend to the "settlement, compromise, payment, or adjustment of any claim involving fraud." Subpart 33.209 of the FAR further provides that contracting officers must refer all cases involving suspected fraud to the agency official responsible for investigating fraud.

2. As a practical matter, the term "denial" is a misnomer in that the contracting officer is precluded from making a final decision on a contractor's claim where fraud is suspected. As such, denial of a claim consists simply of doing nothing with the claim while other courses of action are pursued.

3. Denial of a claim should be viewed as simply the first of possibly many steps in the resolution of a fraudulent claim.

C. Counterclaims Under the CDA

1. Per 41 U.S.C. § 604: "[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim."

2. Until recently, this provision of the CDA has been applied in only a small number of cases. This may in part be due to the deterrent effect of this statute. See United States ex. ral. Wilson v. North American Const., 101 F. Supp.2d 500, 533 (S.D. Tex 2000) (district court unwilling to enforce this provision of the CDA because there were "very few cases applying 41 U.S.C. 604"). See also UMC Elecs. v. United States, 249 F.3d 1337 (Fed. Cir. 2001); Larry D. Barnes, Inc. (d/b/a TRI-AD Constructors) v. United States, 45 Fed. Appx. 907 (Fed. Cir. 2002) (provision successfully applied by CAFC).

3. It is not possible to enforce this section of the CDA in litigation before the boards because of the language at 41 U.S.C. Section 605 (a), which states: "[t]he authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine." The boards have generally interpreted this language as meaning only Department of Justice (DOJ) has the authority to initiated a claim under this provision. This is because (in the eyes of the boards) only DOJ has the authority to administer or settle disputes involving fraud under the current statutory scheme. See TDC Management, DOT BCA 1802, 90-1 BCA ¶ 22,627.

D. Default Terminations Based on Fraud.

1. Where a contractor challenges the propriety of a default termination before a court or board, the government is not precluded under the CDA from introducing evidence of fraud discovered after the default termination, and using that evidence to support the termination in the subsequent litigation.

2. Some grounds for default termination.

a. Submission of falsified test reports. Michael C. Avino, Inc., ASBCA No. 317542, 89-3 BCA ¶ 22,156.

b. Submission of forged performance and payment bonds. Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096.

c. Submission of falsified progress payment requests. Charles W. Daff, Trustee in Bankruptcy for Triad Microsystems, Inc. v. United States, 31 Fed. Cl. 682 (1994).

E. Voiding Contracts Pursuant to FAR 3.7

1. Subpart 3.7 of the FAR establishes a detailed mechanism for voiding and rescinding contracts where there has been either a final conviction for illegal conduct in relation to a government contract, or an agency head determination of misconduct by a preponderance of the evidence.

2. Authority to void a contract pursuant to Subpart 3.7 of the FAR is derived from:

a. 18 U.S.C. § 218;

b. Executive Order 12448, 50 Fed. Reg. 23,157 (May 31, 1985); and,

c. Subsection 27(e)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. § 423).

3. Under this FAR provision, a federal agency shall consider rescinding a contract upon receiving information that a contractor has engaged in illegal conduct concerning the formation of a contract, or there has been a final conviction for any violation of 18 U.S.C. §§ 201-224.

4. The decision authority for this provision is the agency head, which for DOD has been delegated to the Under Secretary of Defense (Acquisition, Technology, and Logistics).

5. No recorded cases of this provision of the FAR being applied.

F. Suspending Payments Upon a Finding of Fraud, FAR 32.006.

1. FAR 32.006 allows an agency head to reduce or suspend payments to a contractor when the agency head determines there is "substantial evidence that the contractor's request for advance, partial, or progress payments is based on fraud."

2. The authority of the agency head under this provision may be delegated down to Level IV of the Executive Schedule, which for the Department of the Army is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA (ALT)).

3. This provision of the FAR is a potentially powerful tool in that the government can stay payment of a claim without the danger of a board treating the claim as a deemed denial, thus forcing the government into a board proceeding before the government's case can be developed.

4. Only one recorded board decision involving this provision of the FAR. TRS Research, ASBCA No. 51712, 2001-1 BCA ¶ 31,149 (contracting officer suspended payment on invoices pending completion of an investigation involving fraud allegation, but failed to seek written permission from the agency head to take such action; ASBCA found the government in breach of the contract and sustained the appeal).

G. Voiding Contracts Pursuant to the Gratuities Clause, FAR 52.203-3.

1. Allows DOD to unilaterally void contracts upon an agency head finding that contract is tainted by an improper gratuity. Decision authority for the Department of the Army has been delegated to the ASA (ALT).

2. Authority stems from 10 U.S.C. § 2207, which requires the clause in all DOD contracts (except personal service contracts).

3. Considerable due process protections for the contractor.

4. Exemplary damages of between three to ten times the amount of the gratuity.

5. Procedures used very effectively in response to a fraudulent bidding scheme centered out of the Fuerth Regional Contracting Office, Fuerth, Germany. See Schuepferling GmbH & Co., ASBCA No. 45564, 98-1 BCA ¶ 29,659; ASBCA No. 45565, 98-2 BCA ¶ 29,739; ASBCA No. 45567, 98-2 BCA ¶ 29,828; Erwin Pfister General-Bauunternehmen, ASBCA Nos. 43980, 43981, 45569, 45570, 2001-2 BCA ¶ 31,431; Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 2001 BCA ¶ 31,264.

XII. BOARD'S OF CONTRACT APPEAL TREATMENT OF FRAUD.

A. Jurisdiction.

1. Theoretically, the boards are without jurisdiction to decide appeals tainted by fraud.

a. Under the CDA, "[e]ach agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal." 41 U.S.C. § 607(d).

b. Because the CDA precludes contracting officers from issuing final decisions where fraud is suspected, and the boards only have jurisdiction over cases that can be decided by a contracting officer, the boards are effectively barred from adjudicating appeals involving fraud. See 41 U.S.C. § 605(a).

c. As a practical matter, the boards exercise a form a de facto jurisdiction in that a decision concerning a motion to dismiss an appeal for fraud will have a dispositive effect on the case.

B. Dismissals, Suspensions and Stays.

1. Government must demonstrate that the possibility of fraud exists or that the alleged fraud adversely affects the Board's ability to ascertain the facts. Triax Co., Inc., ASBCA No. 33899, 88-3 BCA ¶ 20,830.

2. Mere allegations of fraud are not sufficient. General Constr. and Dev. Co., ASBCA No. 36138, 88-3 BCA ¶ 20,874. Four-Phase Systems, Inc., ASBCA No. 27487, 84-1 BCA ¶ 17,122.

3. Boards generally refuse to suspend proceedings except under the following limited circumstances:

a. When an action has been commenced in a court of competent jurisdiction, by the handing down of an indictment or by filing of a civil action complaint, so that issues directly relevant to the claim before the board are placed before that court;

b. When the Department of Justice or other authorized investigatory authority requests a suspension to avoid a conflict with an ongoing criminal investigation;

c. When the government can demonstrate that there is a real possibility that fraud exists which is of such a nature as to effectively preclude the board from ascertaining the facts and circumstances surrounding a claim; and

d. When an appellant so requests to avoid compromising his rights in regard to an actual or potential proceeding. See Fidelity Constr., 80-2 BCA ¶ 14,819 at 73,142.

C. Fraud as an Affirmative Defense.

1. Most often, the government elects to treat fraud as a jurisdictional bar, and pursues the issue in a motion to dismiss.

2. When fraud is cited as an affirmative defense, the boards generally treat the issue consistent with cases where it is presented as a jurisdictional bar. See ORC, Inc. ASBCA No. 49693, 97-1 BCA ¶ 28,750.

XIII. CONCLUSION.